EO: 700
BYE: 202418

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0950

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 20, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective April 9, 2023 (decision # 124747). Claimant filed a timely request for hearing. On July 27, 2023, ALJ Ramey conducted a hearing, and on August 4, 2023, issued Order No. 23-UI-232472, affirming decision # 124747. On August 23, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) KSU Inc. employed claimant as a cabinetry assembler from January 1, 2023, through April 24, 2023.[1]

(2) In approximately 2017, claimant was diagnosed with attention deficit and hyperactivity disorder (ADHD). Claimant received long-term treatment for this condition but did not make the employer aware of his diagnosis or treatment. The condition impacted claimant's work by causing him to be fearful of making mistakes and increasing his propensity to make mistakes. The condition also caused claimant to "be so ashamed and embarrassed" when he made a mistake that he would often be unable to continue working that day or attend work the following day. Transcript at 37. Claimant was frequently absent from work for this reason.

(3) On April 24, 2023, the employer held a meeting which claimant and others attended. At that meeting, a mistake in a product claimant had worked on the previous day was discussed. At some point, outside of claimant's presence, the employer's owners and claimant's supervisor discussed among themselves claimant's work performance and the possibility of discharging him. After the meeting,

[1] The parties offered conflicting testimony regarding the dates of employment. The employer testified that they employed claimant during this period, while claimant testified that they employed him from September 14, 2020 until April 12, 2023. Transcript at 4, 24. This discrepancy was not explained or resolved in the hearing record. As the employer likely based their testimony as to this issue on records kept in the ordinary course of business, it can reasonably be inferred that their testimony regarding the dates of employment is more likely to be accurate, and this fact has been found accordingly.

claimant went to his supervisor's office to discuss the mistake with him alone. Claimant believed that when he walked in the office, he "was being let go." Transcript at 5. He told the supervisor he "wanted to do what was good for the company and if leaving was good for the company. . . I'm 100 percent to do—to do that." Transcript at 5. The supervisor "had already let [claimant] know that they were. . . making [his] last check out for [him] right then and there." Transcript at 5. Claimant understood from the interaction that he had been "discharged," and he was "okay with leaving." Transcript at 5. Claimant did not attempt to discuss the matter with the owners and did not work for the employer thereafter.

(4) After the interaction, the supervisor reported to the owners that claimant had "left and probably wouldn't be back," and suggested that the employer need not prepare a final paycheck because claimant would probably not accept it. Transcript at 38. The supervisor did not represent to the employer that he had discharged or attempted to discharge claimant. The owners were surprised by the separation and later prepared a final paycheck for claimant, which he ultimately accepted.

(5) The owners, aware of claimant's propensity for making mistakes and difficulty responding appropriately to those mistakes, believed they had other work available to claimant that might have been more suitable to a person with those traits. The owners never offered to transfer claimant to such a position and never made claimant aware that such a transfer might have been available.

(6) On May 4, 2023, in response to a text message claimant sent to his former supervisor regarding filing a claim for unemployment insurance benefits, the supervisor texted claimant that claimant was "terminated by [the employer]" and "entitled and expected to file" for benefits, and otherwise expressed support for claimant. Exhibit 1 at 2.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work with good cause.

Nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The parties disputed whether the work separation was a discharge or voluntary leaving. The employer, based on the hearsay account of claimant's supervisor as related to them the day of the separation, contended that claimant voluntarily quit. However, in another hearsay statement offered into evidence by claimant, the supervisor wrote more than a week after the separation that claimant had been "terminated." Exhibit 1 at 2. Claimant contended that he had been discharged based on the conversation with his supervisor in which claimant offered to leave work "if leaving was good for the company," and the supervisor agreed that it would be good for the company. Transcript at 5.

To the extent the supervisor's hearsay accounts conflict with each other and with claimant's first-hand account regarding what occurred during the conversation, claimant's account is entitled to greater weight, and the facts have been found accordingly. Claimant testified that when he had the conversation with his supervisor, he was no longer willing to complete work for the employer because, "I didn't want to hurt them anymore[.]" Transcript at 10. This was consistent with claimant's earlier testimony that claimant made the offer to leave work if it would be "good for the company." Claimant may have

believed that by making this statement he was inviting the employer to decide immediately whether to discharge him, rather than offering his resignation. However, by suggesting an unwillingness to continue working unless the supervisor reassured him that it would be in the employer's interest that he remains employed, the record shows that claimant moved to sever the employment relationship, thereby voluntarily leaving work. That the supervisor declined to reassure claimant, and instead demonstrated acceptance of claimant's idea that his separation from employment would be beneficial to the employer, did not change the characterization of the separation to a discharge. Accordingly, the record shows that claimant voluntarily quit work.

Voluntary quit. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). Claimant had ADHD, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with an impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time. OAR 471-030-0038(4).

As discussed above, claimant voluntarily quit work because he believed he was about to be discharged by the employer for reasons other than misconduct. The order under review concluded that claimant had the reasonable alternative to leaving work of discussing the effects of his impairment with the owners and transferring to more suitable work, and he therefore quit work without good cause. Order No. 23-UI-232472 at 3. The record does not support this conclusion.

A claimant has good cause to quit work to avoid being discharged, not for misconduct, when the discharge was imminent, inevitable, and would be the "kiss of death" to claimant's future job prospects. *McDowell v. Employment Dep't*., 348 Or 605, 236 P3d 722 (2010). As a preliminary matter, the record does not show that claimant committed misconduct. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a). The record does not suggest that the employer believed that claimant engaged in a willful or wantonly negligent violation of the employer's reasonable expectations prior to the work separation. Both claimant and the employer were concerned over claimant's propensity for making mistakes and his severe reactions to having made them, such as missing work. The employer did not rebut claimant's assertion that deficiencies in his work were inadvertent, and that he made these mistakes despite his best efforts to refrain from making them. Transcript at 8, 26. It can reasonably be inferred that claimant's impairment likely contributed to his disproportionate reactions to having made mistakes. The record therefore shows that these mistakes were the result of no more than ordinary negligence, and his reactions to the mistakes were likely a result of his impairment and beyond his reasonable control. Accordingly, if the employer were to have discharged claimant on April 24, 2023, it would not have been for misconduct.

Even though it would not have been for misconduct, the record shows that claimant's discharge was likely inevitable. There appeared to be nothing further that could be done to help claimant in avoiding

the mistakes he continued making, or to lessen his severe reactions after making them. The owners and claimant's supervisor, when considering claimant's most recent mistake, discussed feeling that they might be "out of options" regarding claimant's continued employment. Transcript at 28. An owner further testified that they were talking about "letting him go." Transcript at 30. For reasons explained in greater detail below, the possibility of claimant transferring to another, more suitable position within the business was unlikely to occur and was not discussed with claimant. It therefore was, more likely than not, only a matter of time before the employer discharged claimant. Nonetheless, the evidence did not establish when such a discharge might have taken place, or whether such a discharge would have been likely to harm claimant's future employment prospects, given the owners' surprise that the work separation occurred when it did, and the supervisor's written statement of support to claimant following the separation. Claimant has therefore failed to show, by a preponderance of evidence, that he voluntarily quit to avoid a discharge that was imminent and that would be the "kiss of death" to his future employment prospects, although he did show that his discharge was, more likely than not, inevitable.

Despite this, the record shows that claimant *believed*, based on the circumstances during and immediately preceding his conversation with the supervisor, that his discharge was imminent, inevitable, and would harm his future employment prospects. An owner testified that they had "talked about . . . letting [claimant] go," but said that, "We did not let him know, in any way, shape or form, that we were going to fire him." Transcript at 30. Even if claimant was not privy to these discussions, it can reasonably be inferred that claimant knew generally that his superiors were of this mindset from his supervisor's reaction when he and claimant discussed claimant separating from work. Claimant believed that the mistakes he had made and would continue to make despite his best efforts, in the view of his superiors, made his discharge inevitable. After the April 24, 2023, meeting at which his latest mistake was discussed, and during the ensuing conversation with his supervisor who expressed no desire for claimant to continue working for the employer, claimant also came to believe that his discharge was imminent. Claimant's statements to his supervisor during this conversation suggested that claimant felt his continued mistakes were hurting the employer's business. It is therefore reasonable to infer that claimant, because of these feelings, believed that being discharged under these circumstances would necessarily impact his future employment prospects if he did not prevent such a discharge by offering to leave voluntarily. Accordingly, the record shows that claimant voluntarily quit work because he *believed* that he had to do so to avoid a discharge that was imminent, inevitable, and would harm his future job prospects.

A reasonable and prudent person with the characteristics and qualities of an individual with an impairment such as claimant's would also have believed under these circumstances that a discharge was imminent, inevitable, and would harm their future job prospects. The record suggests that due to his impairment, claimant was frequently unable to work as a result of both his significant concern with avoiding mistakes and inability to avoid making them. The employer testified that between April 1, 2023, and April 24, 2023, for example, claimant only worked ten days, and both parties suggested that he was absent the other work days during this period due to his embarrassment over mistakes. Transcript at 28-29, 36-37. This propensity to make mistakes and have severe reactions to making them were characteristics and qualities that, it can reasonably be inferred, would lead an individual to reasonably believe that they were in danger of their future job prospects being harmed by facing imminent and inevitable discharge as a result of those traits, even though they may not actually have faced such a danger. To such a reasonable and prudent person, the circumstances faced by claimant would have

constituted a situation of such gravity that they would not have continued to work for the employer for an additional period of time. Accordingly, claimant has demonstrated that he quit work due to a grave situation.

Moreover, claimant did not have a reasonable alternative to quitting work. The order under review concluded that claimant had the reasonable alternative to quitting work of discussing his concerns with the owners, who "could have resolved claimant's concerns, including [by] transfer to another position." Order No. 23-UI-232472 at 3. Claimant testified that he was "too nervous" to discuss his diagnosis with the owners or seek potential accommodations. Transcript at 12-13. While the owners may have been unaware of claimant's specific medical diagnosis, they were acutely aware of his condition's effects on his work. One of the owners testified that claimant "just perceived things differently. So, when there would be a mistake, the mistake is the first part but then the second part was he – he would be gone. It bothered him so greatly that he had difficulty continuing to work or wanting to be here pa – possibly for fear of making a mistake. I guess that's a question I should have asked him . . . if there was something else we could do for him that would help him." Transcript at 26-27. Because the owners were already aware of claimant's concerns and did not take affirmative steps to address them, it can be inferred that, more likely than not, discussing with the owners his propensity for making mistakes and having severe reactions to them, or disclosing his specific diagnosis, would not have led to the employer resolving those concerns. Accordingly, this was not a reasonable alternative.

Further, testimony offered by the employer suggested that claimant could have been transferred to an alternate work arrangement of "maybe do[ing] three days of just cleaning the shop and a couple days working with [another employee on assorted tasks]." Transcript at 32. It can reasonably be inferred that because the owners did not suggest such a transfer to claimant (despite internally discussing discharging claimant and feeling "out of options" with him), more likely than not such a transfer was not actually available to claimant at the time of the separation. Accordingly, claimant did not have a reasonable alternative to leaving work and quit with good cause.

For these reasons, claimant voluntarily quit work with good cause and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 23-UI-232472 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;
S. Serres, not participating.

DATE of Service: <u>October 10, 2023</u>

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the

'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。 如果您不明白本判決， 請立即聯繫就業上訴委員會。 如果您不同意此判決，您可以按照該判決結尾所寫的說明， 向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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